Supreme Court, U.S.
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No. 92-938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MAURICE RIVERS AND ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 2, 1992
CERTIORARI GRANTED FEBRUARY 22, 1993

TABLE OF CONTENTS

Item:		Page:
1.	Docket Entries	3a
2.	First Amended Complaint	15a
3.	Answer of Defendant Roadway Express to Plaintiffs' First Amended Complaint	21a
4.	Supplement to Defendant Roadway Express, Inc.'s Answer to Plaintiffs' First Amended Complaint	26a
5.	Memorandum and Order of the United States District Court for the Northern District of Ohio, in *Harvis, et al. v. Roadway Express, Inc., et al.*, November 30, 1988	27a

LOCATION OF ADDITIONAL RECORD EXCERPTS NOT INCLUDED IN THE JOINT APPENDIX

6. Memorandum and Order of the United States District Court for the Northern District of Ohio, in *Harvis, et al. v. Roadway Express, Inc., et al.*,, January 9, 1990, reprinted in the appendix to the Petition for a Writ of Certiorari at pages 19a-24a.

7. Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Ohio, in *Harvis, et al. v. Roadway Express, Inc., et al.*, October 18, 1990, reprinted in the appendix to the Brief of Respondent in Opposition to Petition for a Writ of Certiorari at pages A1-A13.

8. Decision of the United States Court of Appeals for the Sixth Circuit in *Harvis, et al. v. Roadway Express, Inc., et al.*, January 10, 1991, reprinted in the appendix to the Brief of Respondent in Opposition to Petition for a Writ of Certiorari at pages A14-A19.

RELEVANT DOCKET ENTRIES

2/22/87	1	Complaint filed	Summons issued to Attorney.
2/22/87	2	JURY DEMAND of Pltf. filed.	
1/23/87	7	ANSWER of Deft. Union filed. Mld. 4 p. WHS	
1/5/87	8	ANSWER of Deft. Roadway filed. Mld. 5 p. WHS	
9/18/87	52	MAGISTRATE'S REPORT & RECOMMENDATION filed. JGC. Copies mld. 11 p. WHS	
9/28/87	55	OBJECTION of Pltf. to Magistrate's R & R filed. Mld. 8 p. WHS	
10/8/87	62	RESPONSE of Deft. Roadway to Pltf's objections to Magistrate"s R & R filed. Mld. 8 p. WHS	
10/9/87	63	OPPOSITION of Deft. Roadway to motion to amend complaint filed. Mld. 8 p. WHS	
10/19/87	68	(169) 2ND MOTION of Pltf. to amend complaint filed. Mld. 14 p. WHS	
10/19/87	69	RESPONSE of Deft. Union to Pltf's. Objections to Magistrate's R & R filed. Mld. 40 p. WHS	

11/13/87	84	ORDER filed. JWP. Magistrate's R & R adopted; Deft's motion to strike Jury Demand granted. Copies mld. 7 p. WHS
11/16/87	88	MOTION of Deft. Roadway for summary judgment filed. Mld. 98 p. WHS
11/16/87	90	(225) MOTION of Deft. Roadway to separate trials on pltf's 301 Hybrid claims from Race Discrimination Claims filed. Mld. 6 p. WHS
11/16/87	91	(225) MOTION of Deft. Roadway to strike jury demand filed. Mld. 6 p. WHS
11/16/87	92	(225) MOTION of Deft. Roadway to bifurcate issues of liability & damages filed. Mld. 4 p. WHS
12/1/87	109	PRETRIAL ORDER filed. JGC. Pretrial held 12/1/87. Pltf. granted to 12/8/87 to file 3rd amended complaint. Copies mld. 1 p. WHS
12/1/87	113	MOTION of Deft. Union to dismiss / summary judgment re: claims of M. Rivers filed. Mld. 93 p. WHS
12/1/87	114	MOTION of Deft. Union to dismiss / summary judgment re: claims of R. C. Davison filed. Mld. 87 p. WHS
12/1/87	115	(225) MOTION of Deft. Union to dismiss / summary judgment re: claims of J. T. Harvis filed. Mld. 107 p. WHS

12/7/87	122	REPLY of Pltf. to opposition of Deft. Union to 2nd motion to amend complaint filed. Mld. 5 p. (leave to file was granted 12/1/87 - pleading not physically received until this time - pleadings was used for R & R filed. 12/2/87) WHS
12/8/87	124	(203) MOTION to Pltf. for leave to file 3rd amended complaint filed. Mld. 16 p.
12/11/87	126	RESPONSE of Pltf. to Deft. Roadway to motion to strike jury demand. Mld. 6 p.
12/11/87	127	2/4/5/7 RESPONSE of Pltf. to Deft. Roadway's motion to sever pltf's claims and for separate trial **AND** RESPONSE to motion to separate trials re: 301 claim **AND RESPONSE** to Deft. Union's motion for separate trials **AND** Deft. Roadway's motion to bifurcate liability & damages. Mld. 17 p. WHS
12/1/87	132	PT ORDER. JGC. Deft union granted to 12/28/87 to respond to pltf's motion for leave to file 3rd amended complaint; Union and deft Roadway granted leave to file on 12/28/87 their replies to pltfs' response to their motion for separate trials; Pltfs. to reply to union's response re amended complaint motion on or before 1/11/88. DJW
1/19/88	157	REPLY of pltfs' in supp of motion to file 3rd amended complaint. 4pp. DJW

5/17/88	169	ORDER. JWP. Mag's R&R is hereby adopted. Pltfs motion for leave to file an amended complaint is hereby granted. Copies mld. 1pg. cjr.
7/7/88	181	AMENDED ANS of Deft. Union. Mld. 6 p. WHS
1/29/88	194	(200) MOTION of Deft. Roadway for leave to answer pltf's 1st amended complaint & to amend motion for summary judgment instanter. Mld. 4 p. WHS
1/30/88	200	MARGINAL ENTRY ORDER granting Deft. Roadway leave to file answer to 1st amended complaint & amended motion for summary judgment. JGC. Copies mld. 1p. WHS
1/30/88	202	ANSWER of Deft. Roadway to 1st amended complaint. Mld. 5 p. WHS
9/1/88	203	ORDER JWP. R&R is hereby adopted. Pltf's motion to file 3rd amended complaint is hereby denied. Copies mld. 2pp. cjr.
10/18/88	218	1ST AMENDED COMPLAINT Mld. 6pp VI
11/7/88	220	(222) MOTION of Deft. Roadway to supplemental answer to pltfs 1st amended complaint. Mld. 2pp. cjr
11/9/99	221	OPPOSITION of pltf to Deft Roadway's motion to supplement its answer. Mld. 3pp. cjr

11/10/88	222	MARG. ENTRY ORDER granting deft Roadway's motion to supplement answer to pltf's 1st amended complaint. JWP. Copies mld. 1pg. cjr
11/10/88	223	SUPPLEMENTAL ANSWER of deft. Roadway to pltfs 1st amended complaint. Mld. 2pp. cjr
11/30/88	224	MEMO & ORDER. Deft Union's motions for summary judgment are hereby granted. Deft Company's motion for summary judgment is hereby granted in part and denied in part. All pending motions are hereby denied as moot. Copies mld. 6pp. cjr
2/16/89	228	P.T. ORDER. JWP. J. T. 6/6/89. Imp. date 6/5/89. P.T. 5/22/89 at 2:30 p.m. Copies mld. 1 py. cjr
3/14/89	229	MEMO & ORDER. Deft's motion to strike jury demand is hereby denied. Deft's motion to reconsider is hereby granted; Defts motion to bifurcate is hereby denied; Deft's motion to sever claims & for separate trials is hereby granted in part & denied in part. This case is scheduled for p.t. on 4/3/89 at 2:15 p.m. for purposes of scheduling a trial date for Davison & Rivers claims. Copies mld. 4pp. cjr

4/10/89	230	P.T. ORDER. JWP. Held 4/3/89. J.T. set 5/30/89 and 9/12/89. Imp. dates 5/30/89 and 9/11/89. P.T. dates 5/22/89 at 2:30 p.m. and 8/28/89 at 3:30 p.m. Any motions in limine are due 14 days prior to each trial date. Copies mld. 1pg.cjr
5/30/89	243	MIN. OF PROCEEDING. Held 5/30/89. Time: 6 hrs. Jury duly impaneled & sworn according to law and evidence. Opening statements made. Trial recessed but not concluded. Trial to resume at 9:00 a.m. on 5/31/89. cjr
6/1/89	244	MIN. OF PROCEEDING. Held 5/31/89. JWP. Time: 5.5. hrs. Pltf's case continued but not concluded. Testimony taken. Exhibits admitted. Court recessed until 6/1/89 at 9:00 a.m. cjr
6/2/89	246	MIN. OF PRO[CEEDING]. Held 6/1/89. Time: 6 hours. JWP. Trial resumed. Witnesses testified. Exh. admitted. Court recessed until 6/2/89 at 9:00 a.m.
6/2/89	247	MIN. OF PRO. Held 6/2/89. Time: 3 hours. JWP. Trial resumed. Witnesses testified. Exh. admitted. Court recessed until 6/5/89 at 9:00 a.m. cjr
6/5/89	248	MIN. OF PRO. Held 6/5/89. Time: 3.5 hours. Trial resumed but not concluded. Trial to resume 6.6/89 at 9:00 a. cjr

6/5/89	249	MIN. OF PRO. Held 6/6/89. Time: 5.5 hrs. Case con't but not concluded Trial to resume 6/7/89 at 9:00 a.m.
6/7/89	250	MIN. OF PRO. Held 6/7/89. Trial continued but not concluded. Pltf's case concluded. Defts case began. Testimony taken. Trial continued to 6/8/89 at 9:00 a.m. Time: 4 hours.
6/9/89	251	MIN. OF PRO. JWP. Time: 6 hrs. held 6/8/89. Trial resumed but not concluded. Trial to resume 6/9/89. cjr
6/9/89	252	MIN. OF PRO. Held 6/9/89. Time: 6 hours. Trial not concluded. Trial to resume 6/12/89 at 1:15 p.m. 1pg. cjr
6/13/89	253	MIN. OF PRO. Held 6/12/89. Time: 4 hours. Oral motions heard on admission of exh. Closing arguments made. Jury charged. Trial to resume 6/13/89 at 10:00 a.m. cjr
6/13/89	254	SPECIAL VERDICT. Finding of no discrimination based on race. 1pg. cjr
6/10/89	257	ORDER. JWP. Pltfs are hereby ordered to show cause within 21 days of this date why the claim under 42 § 1981 should not be dismissed in accordance with the recent Supreme Court decision on Patterson v. McLean Credit Union. Failure to timely respond to this order will result in said claim being dismissed with prejudice. Copies mld. 1pg. cjr

6/25/89	259	RESPONSE of pltf to show cause order dated 7/10/89. Mld. 13pp. cjr
9/25/89	260	ORDER granting pltf ext of time to file response to show cause order. JWP. Copies mld. 2pg. cjr
9/6/89	261	BRIEF of deft in support of entry of judgment on Harvis' Section 1981 and Title VII claim and in support of dism. of defts Rivers' & Davison's Section 1981 claims. 22pp w/31pp exh. cjr
9/11/89	262	P.T. ORDER. JWP. Held 8/28/89. J.T. 2/27/90 at 9:00 a.m. Emp. 2/26/90 at 9:00 a.m. P.T. 2/12/90 at 2:30 p.m. deft granted leave to reply to plts response to show cause order until 9/6/89. Pltf. is granted until 9/13/89 to file surreply. Copies mld. 1pg. cjr
9/13/89	263	REPLY of Pltfs to deft Roadway response to pltfs response to Patterson. Mld. 7pp with 4pp. cjr
1/9/90	264	MEMO & ORDER. JWP Judgment is hereby entered in favor of deft. on pltfs. Harvis' 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981 claims; and it is further ordered that the 42 § 1981 claims of pltf. against Rivers & Davison be and hereby are dismissed. Copies mld. 4pp. cjr
1/17/90	265	NOTICE. p.t. 1/26/90 at 10:00 a.m. Copies mld. 1pg. cjr

1/23/90	266	JUDGMENT ON DECISION BY COURT. JWP. Judgment is hereby entered in favor of deft. on pltf. Harvis' 42 U.S.C. Sec. 2000e et seq. and 42 U.S.C. Sec. 1981 claims. True copies mld. 1pg. cjr
1/31/90		NOTICE OF APPEAL of pltf. filed. Copies by clerk to attorneys Landwehr, Dixon, Lodge, Boal on 1/31/90. 3pp. cd
1/31/90		APPEAL FEE sum of $105.00 paid by pltf. Rept. #161819
2/1/90	269	TRIAL ORDER. JWP. Jury Impanelment 2/26/90 at 9:00 a.m. JT set for 2/27/90 9:00 a.m. Parties stipulate to the filing of motion in limine re: witnesses by 1/31/90. Copies mld. 1pp. BP
2/21/90	277	PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW of deft. Mld. 20pp. BP
2/27/90	282	MOTION of deft. Roadway to dismiss plts amended complaint. Mld. 12pp with 2pp exh. cjr
2/27/90	283	MIN. OF PRO. N.J. trial began. Time: 5.5 hrs. Pltfs case began. Testimony taken by Atty. Richard Bush admitted pro hac vice. Trial not concluded. Trial resume 2/28/90 at 9:00 a.m. cjr
3/5/90	284	MIN. OF PRO. N.J. cont'd. Time 5.5. hrs. Trial not concluded. Trial to resume 3/1/90 at 9:15 a.m. cjr

3/5/90	285	MEN. OF PRO. N. J. Cont'd. Time: 7.5 hrs. Trial continued but not concluded. Trial to resume on 3/2/90 at 9:15 a.m. 1pg. cjr
4/11/90	291	POST-Tr. Prop. findings of fact and concl. of law by Deft. 22PP. Mld.
4/11/90	296	PLTF's Post-tr proposed findings of fact and conclusion of law. 32pp. cjr
4/23/90	298	REPLY BRIEF of Deft. Roadway to plts post tr proposed findings of fact and conclusion of law. Mld. 25pp. cjr
4/24/90	300	REPLY of pltf to deft's post-tr. proposed findings of fact and concl. of law. Mld. 9pp. cjr
10/18/90	306	FINDINGS OF FACTS & CONCLUSIONS OF LAW. JWP. Deft's motion to dismiss is hereby denied; and it is ORDERED that judgment be, and hereby is entered in favor of deft Roadway Express, Inc. and against plts Maurice Rivers and Robert Davison. Copies mld. 11ppg. cjr
10/22/90	308	(310) MOTION of pltf for decision on motion to strike revised exh. K or in the alternative to reopen proofs and for reconsideration and amendment of judgment. Mld. 4pp. cjr

10/29/90	309	OPPOS to deft Roadway to plts motion for decision on motion to strike revised exh. K or in the alternative to reopen proof sand for reconsideration and amendment of judgment. Mld. 3pp. cjr
2/5/91		OPINION of Sixth Circuit, filed 1/10/91. Judgment is affirmed. dc
2/5/91		ORDER of Sixth Circuit, filed 1/10/91. ordered that the judgment of the district court is affirmed. Issued as mandate 2/1/91. Costs: (Awarded to appellee) Filing fee: None. Printing $240.00. dc (Note - Certified record was never sent)
3/18/91	310	MEMO & ORDER. JWP. Pltfs' motion to strike and for reconsideration of amended judgment are hereby denied. Copies mld. 2pp. cjr
4/17/91	311	NOTICE OF APPEAL of pltf. Copies by clerk to Landwehr on 4/17/91. dc
8/26/92	315	INFORMATION COPY of Opinion from USCA, decided and filed 8/24/92. REVERSE and REMAND for further proceedings under Sec. 1981. dc
8/31/92	316	TRUE COPY of Opinion from USCA, decided and filed 8/24/92. REVERSE and REMANDED for further proceedings under Sect. 1981. dc

10/23/92	317	JUDGMENT of USCA filed 8/24/92. Ordered of the judgment of the district court is reversed and the case is remanded for further proceedings under 42 U.S.C. 1981, in conformity with the Opinion. Issued as mandate 10/21/92. Costs: None. 1pg. dc
12/11/92	318	NOTICE of filing Petition for Certiorari, filed with the Supreme Court, filed 12/7/92, their #92-938. 1pg. dc
1/12/93	319	NOTICE, pretrial 2/8/93 at 9:00 a.m. Copies mld. 1pg. cjr
3/8/93	320	ORDER of Supreme Court, filed 2/22/93, their #92-938. Petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted limited to Question 1 presented by the petition. (This case is consolidated with No. 92-757, Barbara Landgraf v. USI Film Products, et al.) 1pg. dc

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN T. HARVIS, JR.,
MAURICE RIVERS, AND
ROBERT C. DAVISON,

Plaintiffs,

- vs -

Civil Action
No. C86-7955
Hon. John W. Potter

ROADWAY EXPRESS, INC. and
LOCAL 20, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, AND
HELPERS OF AMERICA,

Defendants.

FIRST AMENDED COMPLAINT

FACTS:

1. This is a claim for race discrimination, breach of collective bargaining contract, and breach of a union's duty of fair representation. Claims lie under 42 USC § 1981 and 2000e, 29 USC 185(a) and 159(a). Jurisdiction lies under 28 USC 1337.

2. Defendant Roadway Express Inc. ("Roadway") is an employer, as defined under the federal labor laws. It operates a facility in Toledo, Ohio.

3. Defendant Local 20 of the Teamsters, Chauffeurs Warehouseman, and Helpers of America ("Local 20") is a labor organization as defined in the federal labor laws. It represents a unit including mechanics at Roadway's facility in Toledo, and it owes them a duty of fair representation.

4. Plaintiffs James T. Harvis, Jr., ("Harvis"), Maurice Rivers ("Rivers"), and Robert C. Davison ("Davison") were Roadway mechanics represented by Local 20 until their discharge recently.

5. Each plaintiff is black, and each is and was prior to his discharge a member and supporter of TDU ("Teamsters for a Democratic Union), a reform caucus in Local 20 and the Teamsters nationally. Each was also a supporter of dissident activities and slates in Local contract and union election campaigns held in 1986.

6. The union's leadership was openly hostile to TDU and dissident factions, and facilitated a busload of its members and agents to go to a TDU convention in Romulus, Michigan, in October, 1983 to physically wreck a TDU meeting.

7. Harvis was discharged April 30, 1986, and Rivers and Davison were discharged September 26, 1986.

8. Each filed a grievance protesting his discharge. Harvis was informed that his grievance was denied on June 20, 1986. Rivers and Davison were informed that their grievance were denied on December 10, 1986.

9. Harvis' discharge was in violation of the contract in that it was taken without just cause. More particularly he was accused of gross insubordination and his accumulated work record in connection with an incident where a supervisor threatened to kick him and he responded. No blows were exchanged. The following day the supervisor backed off of his threat. Harvis worked to more day and then was fired.

10. Harvis' grievance was not fairly processed and the unit did not fairly represent him, in that, among other things.

a) his union agent recognized the charge against him was baseless, telling him h would have his job back the next day.

b) his union agent and the grievance committee which decided his case advised and pressured him to sign a paper waiving his legal rights during the grievance process;

c) when he refused to sign the paper the grievance committee improperly withheld its decision for a month;

d) grievants who have refused to sign the paper have never won their grievance;

e) a Roadway officer improperly attended and participated in the grievance decision, depriving the grievance panel of is neutrality and objectivity;

f) TDU members or supporters have consistently lost grievances comparable to grievances which non TDU members or supporters have won;

g) the decisions did not draw its essence from the contract.

11. Rivers' and Davison's discharge were taken without just cause. More particularly Roadway scheduled a hearing for them for September 26, 1986, based on conduct for which a grievance committee had previously exonerated them with backpay. The company did not notify them in writing of any obligation to attend a hearing. In the past, hearings have been held for them and their employees without their being present, and no adverse consequences followed the failure to attend. The only purpose of such hearings is to give the employee a chance, if he wishes, to

explain his side of the story. Rivers and Davison declined to attend the hearing and the hearing resulted in their discharges, allegedly based on the previous exonerated conduct and the failure to attend the hearing itself.

12. Rivers' and Davison's grievances were not fairly processed and the union did not fairly represent them, in that, among other things:

a) the company's charges against them were completely baseless;

b) the grievance committee which decided their cases advised and pressured them to sign a paper waiving their legal rights during the grievance process;

c) when they refused to sign the paper the committee improperly withheld its decision for a month;

d) grievants who have refused to sign the paper have never won their grievance;

e) TDU members or supporters have consistently lost grievances comparable to grievances which non TDU members or supporters have won;

f) the union agent improperly presented evidence to the grievance committee containing derogatory information about them outside the contractual nine-month period;

g) in the case of Davison, the company improperly presented altered affidavits to the committee;

h) the decisions did not draw their essence from the contract.

13. The company has in the last year discharged all but one of its black mechanics on baseless charges. That one was discharged some years ago, was reinstated only by

an arbitrator's decision, and more recently was threatened with discharge again.

14. The company has consistently disciplined and harassed its black mechanics treating them differently than white mechanics in comparable situations.

15. On or about October 27-29, 1986, plaintiffs filed timely charges with the Ohio Civil Rights Commission (OCRC) and the Equal Employment Opportunity Commission (EEOC). On or about November 12, 1986, plaintiffs withdrew their OCRC cases so that the EEOC would investigate them on a joint basis. By letters postmarked July 8, 1987, plaintiffs received notices of right to sue Roadway from the EEOC.

CLAIMS

16. The discharges discriminated against the plaintiffs because of their race in violation of 42 U.S.C. § 1981.

17. The discharges violated the contract in violation of 29 U.S.C. 185(a).

18. The grievance decisions do not bar this proceeding, regardless whether the defects in them arose as a result of conduct by the company, the union or the grievance panel.

19. The union's grievance-handling violated the union's duty of fair representation under 29 U.S.C. 159(a).

20. The foregoing acts of the defendants were done with malice.

21. As a result of defendants' acts plaintiffs have suffered economic losses, mental anguish, and other damages, for which they are entitled to compensation.

WHEREFORE, plaintiffs respectfully request this court:

a) order defendants jointly and severally to pay plaintiffs' damages including punitive damages against Roadway;

b) order that plaintiffs be reinstated to their former positions with full backpay and benefits;

c) order defendants to pay plaintiffs' costs, interest and attorney fees, and

d) order any other just relief.

Respectfully submitted,

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Dated: September 28, 1987

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

John T. Harvis, Jr., et al.,

Plaintiffs, Civil No. C86-7955

- vs - HON. JOHN W. POTTER

Roadway Express, Inc., et al.,

Defendants. ANSWER OF DEFENDANT ROADWAY EXPRESS,TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Now comes defendant Roadway Express, Inc., by and through its attorneys, and answers plaintiffs' first amended complaint as follows:

1. Answering paragraph 1 of plaintiffs' first amended complaint, defendant admits that claims of race discrimination, breach of collective bargaining contract and breach of a union's duty of fair representation may be actionable violations of certain specified federal statutes, but defendant denies each and every other allegation contained in paragraph 1 of the first amended complaint.

2. Answering paragraph 2 of plaintiffs' first amended complaint, defendant admits the allegations contained therein.

3. Answering paragraph 3 of plaintiffs' first amended complaint, defendant admits the allegations contained therein.

4. Answering paragraph 4 of plaintiffs' first amended complaint, defendant admits that it employed defendants. Defendant denies the remaining allegations contained in paragraph 4 of plaintiffs' first amended complaint.

5. Answering paragraph 5 of plaintiffs' first amended complaint, defendant admits that each plaintiff is black. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 5 of plaintiffs' first amended complaint and therefore denies said allegations.

6. Answering paragraph 6 of plaintiffs' first amended complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies said allegations

7. Answering paragraph 7 of plaintiffs' first amended complaint defendant admits the allegations contained therein.

8. Answering paragraph 8 of plaintiffs' first amended complaint, defendant admits that each plaintiff filed a grievance. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 8 of plaintiffs' first amended complaint and therefore denies said allegations.

9. Answering paragraph 9 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

10. Answering paragraph 10 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

11. Answering paragraph 11 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

12. Answering paragraph 12 of plaintiffs' first

amended complaint, defendant denies the allegations contained therein.

13. Answering paragraph 13 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

14. Answering paragraph 14 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

15. Answering paragraph 15 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

16. Answering paragraph 16 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

17. Answering paragraph 17 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

18. Answering paragraph 18 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

19. Answering paragraph 19 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

20. Answering paragraph 20 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

21. Answering paragraph 21 of plaintiffs' first amended complaint, defendant denies the allegations contained therein.

AFFIRMATIVE DEFENSES

22. Plaintiffs are misjoined as parties in this case as their claims do not arise out of the same transaction, occurrence or succession or series of transactions or occurrences and as there are no questions or law or fact common to plaintiffs' claim.

23. All or a portion of each plaintiffs' claims are barred by the applicable statute of limitations.

24. Plaintiffs and each of them have failed to exhaust available contractual or internal remedies.

25. Plaintiffs and each of them have failed to mitigate claimed damages.

26. Plaintiffs' complaints and each of them fail to state a claim upon which relief can be granted.

27. Plaintiffs' claims and each of them have been finally adjudicated and such claims are barred by the doctrine of arbitration and award.

28. Plaintiffs' claims and each of them have been finally adjudicated in other judicial or administrative forms and may not proceed herein under the doctrines of collateral estoppel or res judicata.

29. Plaintiffs and each of them are not entitled to a jury trial.

WHEREFORE, defendant prays that plaintiffs' first amended complaint be dismissed and that it may recover its costs herein expended, including reasonable attorneys fees and any other relief which the court deems appropriate.

EASTMAN & SMITH

s/

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Attorneys for defendant
Roadway Express, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

John T. Harvis, Jr., et al.,

Plaintiffs, Civil No. C86-7955

- vs -

Roadway Express, Inc., et al.,

Defendants. SUPPLEMENT TO DEFENDANT ROADWAY EXPRESS, INC'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Now comes defendant Roadway Express, Inc. by and through its attorneys, and supplement its answer to plaintiffs' first amended complaint by interlineation as follows:

26: Plaintiffs' complaints and each of them fail to state a claim upon which relief can be granted. 42 U.S.C. § 1981 does not confer a private right of action for plaintiffs in this case. *Patterson v. McClean Credit Union*, U.S. Supt. Ct. No. 87-1707, argued October 12, 1988.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed November 30, 1988]

John T. Harvis, Jr., et al.,

Plaintiffs, Case No. C86-7955

- vs -

Roadway Express, Inc., et al.,

Defendants. MEMORANDUM AND ORDER

POTTER, J.:

This cause is before the Court on motions for summary judgment filed by defendant Roadway Express, Inc. (Company) and defendant Teamsters, Local 20 (Union), plaintiffs' opposition, defendants' replies, plaintiffs' response to new matters and defendant Union's reply. The three plaintiffs in this action are black and were employed as mechanics by defendant Company. Plaintiffs' claims arise from their discharges. Plaintiffs' first cause of action is a hybrid section 301/duty of fair representation claim against both defendants. Plaintiffs' second cause of action for race discrimination is only asserted against defendant Company.

Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R.

> Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "where the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 06 S. Ct. 2505, 2512 (1986).... In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*. 106 S. Ct. 1348, 1356-57 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1988). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. *Id.* A moving party may discharge its burden "by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that the is a genuine issue for trial." *Anderson*, 477 U.S. at 250. "[P]laintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor." *Id.* at 257.

Defendant Union's claim that plaintiff Harvis' suit is barred by the statute of limitations is not well taken. The Court finds the action was filed by Harvis within six months. The Court will next address the motions for summary judgment on plaintiffs' hybrid section 301/duty of fair representations claim. Specifically, the Court will consider whether the Union breached its duty of fair representation to plaintiffs. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). "A union's conduct may be sufficiently arbitrary to establish a breach of its duty to fairly represent its members when it handles a grievance in a 'perfunctory' manner, with caprice or without rational explanation." *Poole v. Budd Co.*, 706 F.2d 181, 183 (6th Cir. 1983). A plaintiff may establish a breach of the union's duty by evidence of personal hostility or bad faith. *Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1340-1341 (6th Cir. 1975).

Defendant Union has set forth facts which, if uncontroverted, would entitle it to summary judgment as to all plaintiffs on the claim for breach of duty of fair representation. In effect, the Union has demonstrated that plaintiffs' case lacks evidence from which the court could find in their favor on this claim. The claims of all three plaintiffs involve their discharge from employment with the defendant Company. Grievances were filed in each plaintiff's case and each grievance was processed through final and binding arbitration in accordance with the collective bargaining agreement. The record in this case is voluminous. It includes hundreds of pages of briefing and thousands of pages of deposition testimony and exhibits. Despite this extensive record, plaintiffs have failed to present any evidence of arbitrariness, discrimination or bad faith in the processing of their grievances.

Plaintiffs argue that the Union officers who represented them were hostile to plaintiffs because they

were members of a dissident faction within the Union. Plaintiffs contend that this hostility was transferred to them during the grievance proceedings. Plaintiffs have presented no evidence in support of their contentions. To the contrary, each plaintiff testified in his deposition that the Union representative handling his grievance exhibited no personal hostility toward him. Plaintiffs claim that their grievances were arbitrated in a perfunctory manner is also unsupported by any evidence. Plaintiffs have failed to present specific facts creating a genuine issue of material fact in opposition to the Union's motion for summary judgment. Plaintiffs have not shown that the Union failed to take any reasonable step in processing their grievances through arbitration or that any complaint they have with the Union's handling of their grievances could have had a material impact on their outcome.

Plaintiffs continue to assert that the Union's failure to process race discrimination claims through the grievance machinery is a breach of its duty, despite this matter having already been adjudicated in this case. This claim is not well taken for the reasons set forth in the magistrate's Report and Recommendation filed June 6, 1988. The holding in *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981) is not as broad in scope as plaintiffs suggest. The defendant union in that case was found to have breached its statutory duty based upon the facts found by the trial judge. Plaintiffs in this case have produced no evidence from which it could be determined that their situation was factually similar to *Farmer*. In sum, there is no material fact as to the duty of fair representation claim, and the Union is entitled to prevail as a matter of law on the claims of all three plaintiffs.

Plaintiffs assert that they are entitled to prevail on their hybrid section 301/duty of fair representation claim even if they cannot establish the breach of the Union's duty. The Court believes this assertion is contrary to the well established law as set forth in *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

> The suit against the employer rests on §301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act.
>
> "Yet the two claims are inextricably interdependent. 'To prevail against either the company of the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.'" *Mitchell*, *supra*, at 66-67 (Stewart, J., concurring in judgment), quoting *Hines*, *supra*, at 570-571. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

Id. at 164-165. It is clear that plaintiffs may not maintain this claim against the Company where the Court has determined that the Union is entitled to summary judgment.

Nor may plaintiffs directly attach the arbitration awards adjudicating their grievances in this action. It is not the award itself which is at issue in this case, but the conduct of the parties to the arbitration. For this reason also, the issue regarding the applicable collective bargaining agreement is not an issue of material fact. This Court has already held that the decisions of the arbitral committee are final and binding on the parties in this case in its order of May 24, 1988. For example, plaintiffs' complaint does not allege a cause of action to set the awards aside, pursuant to the Arbitration Act, 9 U.S.C. §1, *et seq.*, under which the court could engage in a narrow, but direct review of the final decision of the arbitral committee. The Court does not determine whether plaintiffs would have standing to bring such an action, but only illustrates the contrast between this case and an action brought to set aside an award. Thus, the

final decision must stand as to all parties, and plaintiffs' hybrid section 301/duty of fair representation claim will be dismissed.

Plaintiffs' remaining claims are against the defendant Company for race discrimination under 42 U.S.C. §1981 and Title VII. The Company contends that plaintiffs are barred from litigating these claims because of the final and binding arbitration decisions. The showing required to prevail under either statute is essentially the same. *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 69 (6th Cir. 1985). The principles underlying Title VII and Section 1981 are essentially the same. *Benson v. Little Rock Hilton Inn*, 742 F.2d 414, 416 (8th Cir. 1984). "In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974). The case before the Court provides all the more reason why plaintiffs' claims under Section 1981 and Title VII should not be barred by the final arbitration decision where plaintiffs had no opportunity to litigate their race discrimination claims in the grievance procedure.

> A Title VII case of sexual discrimination must be analyzed under the three prong test articulated by the Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). A plaintiff carries the burden of establishing a *prima facie* case. 450 U.S. at 252-53, 101 S. Ct. at 1093-94. If she establishes a *prima facie* case, the defendant must then articulate a nondiscriminatory reason for its actions. *Id.* If the employer does this, the burden is again on the plaintiff to prove that the articulated reason was pretextual and not the true reason, either by showing

> that a discriminatory reason was the more likely motivation, or by showing that the articulated reason is unworthy of belief. (Citations omitted.)

Mills v. Ford Co., 800 F.2d 635, 637 (6th Cir. 1986).

"The plaintiff must ultimately prove that the defendant intentionally discriminated against her. 450 U.S. at 253, 101 S. Ct. at 1093." *Id.* at 638. "Proof of the four *McDonnell Douglas* elements or other direct or statistical proof raises a rebuttable presumption of discrimination." (Footnotes omitted.) *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940 (6th Cir. 1987).

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the fact of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. (Footnotes omitted.)

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

"The burden of production then shifts to the defendant employer to provide a legitimate nondiscriminatory reason for the action taken." *Simpson*, 823 F.2d at 940.

> A plaintiff can establish that the legitimate, nondiscriminatory reason for the employment decision articulated by the defendant employer is pretextual in one of two ways. the first is to establish by a preponderance of the evidence that the discriminatory reason was the true reason motivating the employer's conduct. Alternatively, the plaintiff can prove pretext by showing that the proffered legitimate reason was false. (Citations omitted.)

Sims v. Cleland, 813 F.2d 790, 792 (6th Cir. 1987).

Plaintiffs claim that their discharges were racially motivated. The Court determines for the purpose of this motion that plaintiffs have each established a prima facie case under Section 1981 and Title VII. Defendants assert that plaintiffs' discharges were for the legitimate nondiscriminatory reasons advanced to the arbitration committee. Plaintiffs' claim that they were discharged for violations for which similarly situated white employees have received lesser discipline or no discipline and that the defendants' reasons are pretextual. The Court has thoroughly reviewed the pleadings, affidavits, depositions transcripts and other materials filed in support of and in opposition to summary judgment. It is this Court's opinion that genuine issues of material fact exist as to plaintiffs' claims under Section 1981 and Title VII against defendant Company.

The Court has also reviewed all the pending motions in this action relating to various issues of trial management. The Court believes the issues raised in these motions are now moot in light of the foregoing opinion. This cause will now proceed to trial against the defendant Company on plaintiffs' claims of race discrimination. Plaintiffs' claims under Section 1981 will be tried to a jury and the claim under Title VII will be tried to the Court. Title VII matters not appropriate for presentation to the jury under Section 1981 will be heard out of the presence of the jury.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that the defendant Union's motion for summary judgment be, and hereby are, GRANTED; and it is

FURTHER ORDERED that defendant Company's motion for summary judgment be, and hereby is GRANTED in part and DENIED in part; and it is

FURTHER ORDERED that all pending motions be, and hereby are, DENIED as moot.

S/S

UNITED STATES DISTRICT JUDGE